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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 714 (VM)

5 DOV MALNIK,

6 Sentence

7 Defendant.

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8 New York, N.Y.
9 November 19, 2021
10 9:30 a.m.

11 Before:

12 HON. VICTOR MARRERO,

13 District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

DANIEL TRACER

RICHARD A. COOPER

18 Assistant United States Attorney

19 MICHAEL S. SCHACHTER

RANDALL W. JACKSON

20 Attorneys for Defendant

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(The Court and all parties present remotely)

THE COURT: Good morning, this is a proceeding in the matter of United States v. Malnik, Docket No. 19 Cr. 714.

Is Mr. Malnik, the defendant on the line?

THE DEFENDANT: Yes. Good morning, your Honor.

THE COURT: Counsel, please enter your appearances for the record.

MR. TRACER: Good morning, your Honor. This is Daniel Tracer with the US attorney's office.

MR. SCHACHTER: And good morning, your Honor. This is Michael Schachter on behalf of Mr. Malnik.

THE COURT: Thank you.

MR. JACKSON: Good morning, your Honor. This is Randall Jackson on behalf of Mr. Malnik.

MR. COOPER: Good morning, your Honor. Peter Cooper for the government as well.

THE COURT: As you know, we are in the midst of the COVID-19 pandemic. And I am conducting this proceeding remotely pursuant to the authority provided by Section 15002 of the CARES Act. Counsel are appearing telephonically and the defendant, Mr. Malnik, is participating by telephone rather than in person. I am conducting this proceeding by teleconference rather than videoconference under the CARES Act because I find that videoconferencing is not yet reasonably and reliably available in our district at this time based on my

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1 understanding of this district's currently limited technical
2 capability and other constraints.

3 The Court scheduled proceeding as the sentencing of
4 Mr. Malnik in this matter. Under normal circumstances,
5 everyone participating in this proceeding would be physically
6 present in the courtroom. I am instead conducting this
7 proceeding remotely to ensure the safety of everyone and avoid
8 the spread of COVID-19.

9 I note that defense counsel has indicated that
10 Mr. Malnik's consent to proceed has been given. I want to
11 confirm on the record that Mr. Malnik agrees to proceed by
12 means of teleconference.

13 Mr. Malnik, did you discuss waiving your physical
14 appearance at this proceeding with your counsel?

15 THE DEFENDANT: Yes, your Honor, I did. And I agree.
16 This is fine. Thank you, your Honor.

17 THE COURT: Thank you. I find that Mr. Malnik has
18 knowingly and voluntarily agreed to participate in this
19 conference by telephone and has consented to waiver of his
20 right to appear in person.

21 I have read and reviewed the presentence investigation
22 report dated August 17, 2021 and revised September 10, 2021,
23 which was prepared in connection with today's sentencing of
24 Mr. Malnik. I've also read the submission from defense counsel
25 dated November 9, 2021, including the attached exhibits, the

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1 submission from the government dated November 12, 2021, and
2 defense counsel's reply submission dated November 14, 2021.

3 Mr. Tracer, has the government read and reviewed the
4 presentence report?

5 MR. TRACER: Yes, your Honor.

6 THE COURT: Does the government have any additional
7 information or objections about the report to raise at this
8 time?

9 MR. TRACER: No. No, your Honor.

10 THE COURT: Mr. Schachter, have you read and reviewed
11 the presentence report?

12 MR. SCHACHTER: I have, your Honor. And we have
13 discussed it with our client as well.

14 THE COURT: And do you have any objections to the
15 report to raise at this point?

16 MR. SCHACHTER: No, your Honor.

17 THE COURT: Mr. Malnik, have you read and reviewed the
18 presentence report?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Have you discussed it with your attorney?

21 THE DEFENDANT: Yes, I did, your Honor.

22 THE COURT: And do you have any objections to the
23 report to raise at this point?

24 THE DEFENDANT: No, I don't, your Honor.

25 THE COURT: On June 25, 2021, Mr. Malnik pled guilty

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1 pursuant to plea agreement before Magistrate Judge Stewart
2 Aaron to Count Nine of superseding indictment 19 Cr. 714, which
3 charged him with securities fraud in violation of 15 U.S.C.
4 Sections 78J.B and 78F.F and also 17 CFR Section 240.10B-5 and
5 Section 2, that is 18 U.S.C. Section 2.

6 As part of his plea of guilty, Mr. Malnik admitted the
7 forfeiture allegation with respect to Count Nine. The Court
8 accepted Mr. Malnik's guilty plea on July 14th, 2021, having
9 found that Mr. Malnik entered the plea voluntarily, knowingly
10 and voluntarily and that there was a factual basis for the
11 guilty plea.

12 Mr. Tracer, does the government have any additional
13 comments or other circumstances for the Court's consideration
14 in connection with sentencing?

15 MR. TRACER: Sure, your Honor. Would this be the
16 opportunity for the government to provide its view and advocacy
17 to the Court?

18 THE COURT: Yes.

19 MR. TRACER: Thank you very much, your Honor. I would
20 proceed for a few minutes. We don't want to repeat the
21 information that's in our letter, but I would like to make a
22 few points for your Honor to consider in connection with the
23 sentencing.

24 The first point that we want to be very clear about is
25 that this was a very serious crime. The crime, as it's now

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1 explained in our submission, as well as the PSR, involved the
2 defendant knowingly using stolen material nonpublic information
3 for years and using that information to make a lot of money, to
4 make profits of millions of dollars. And in this particular
5 case, the source of that information, the MNPI in question, it
6 was stolen from investment banks who had clients and for whom
7 both the investment banks and the clients it was important that
8 this information be kept confidential. And nevertheless,
9 individuals who worked at these banks stole it. They accessed
10 information they were not supposed to be accessing. And they
11 basically sold it for a profit to various individuals. And
12 ultimately, it made its way to the defendant.

13 And using and stealing that information is a very
14 serious crime. It undermines the integrity of the securities
15 market. It's a form of cheating in connection with stock
16 trading. And so it needs to be punished appropriately.

17 I know that the defendant makes the point in his
18 submission -- I want to address a couple of the points that the
19 defendant makes -- one of them is the notion that the insiders,
20 in other words, the people who worked at the investment bank,
21 are the ones who are more culpable here. And I submit that
22 it's not quite that simple. And while it is true that it is
23 the insiders who do personally breach a duty to their
24 employer -- so in that respect, there is a certain component of
25 culpability to this -- schemes like this are in fact and in

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1 truth driven by the people who are higher up the food chain,
2 like the defendant, that use that information to then make
3 millions of dollars. In other words, the entire demand for
4 this kind of stealing of confidential information is really
5 driven by people who trade, like Mr. Malnik, and who ultimately
6 make millions of dollars doing so. So they both sort of drive
7 the enterprise and they make the most profit from it. So while
8 it is true that he is not the personal person breaching the
9 duty, the role that he played here is very significant and
10 contributes fundamentally to the operation of this kind of
11 criminal enterprise.

12 The second point that I want to highlight in
13 connection with sentencing is that this crime was intentionally
14 and purposefully very well hidden. As described in the PSR and
15 our sentencing submission, numerous means were employed to hide
16 this conduct. Meetings were conducted in person. They were
17 using burner phones, which were these unregistered phones that
18 they got rid of after using them, and some of the trading in
19 this case was carried out in the name of companies. And all
20 this was done in order to hide the crime because the defendant
21 understood -- along with the other people he was working
22 with -- that what they were doing was wrong. And those kinds
23 of circumstances are significant, for two reasons, in the
24 Court's consideration:

25 Number one, they evince a certain level of brazenness

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1 and culpability where, again, we think that just punishment
2 requires that the punishment be substantial enough to account
3 for those kinds of factors. Second, the other implication is
4 that the use of these kinds of concealments make these crimes
5 difficult; difficult to uncover, difficult to prosecute. And
6 so when these crimes are uncovered, again, we submit, it's
7 important that there be a punishment that's commensurate with
8 the crime.

9 The last point that I'll make is I know that the
10 defendant, in his submission, points to other sentences in the
11 broader investigation, where individuals received sentences,
12 either time served in the case of Mr. Cohen, or a year and a
13 day in the case of Mr. Lavidas. And I just want to point out
14 for the Court's consideration, those sentences were given --
15 government counsel on this call having been involved in both of
16 those sentencings -- they were very heavily driven by the time
17 period in which they were given. It was the summer of 2020.
18 And while I am mindful that the COVID pandemic is not over at
19 this point, that we are still operating under certain
20 restrictions due to COVID, times have changed substantially
21 since that time period.

22 At that point, there were no vaccines available.
23 There was a great deal of uncertainty. We were only a few
24 months into the pandemic and nobody had a really good
25 understanding of what would happen. And frankly, almost

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1 everything that was happening was remote at that time.

2 At this point, we do have vaccinations. The Bureau of
3 Prisons has the situation under far more control than they did
4 perhaps at an earlier point. And in fact, both government
5 counsel and defense counsel on this call, I understand, have
6 been involved in numerous in-person jury trials over the last
7 few months and a little more than that time. So while we are
8 still sort of not at the complete other end of the tunnel,
9 conditions have changed substantially such that it is no longer
10 appropriate for COVID-19 to account for the type of drastic
11 departures we may have seen a number of months ago.

12 I'll note that the defendant also points out that he
13 spent a substantial amount of time in Swiss prison, which as we
14 note in our submission, we don't object to that time being
15 included within a sentence, although we would point out that
16 the length of that prison term was driven most predominantly by
17 the fact that the defendant fought extradition and litigated it
18 on various levels of appeal in Switzerland, which of course was
19 his right to do and he should not be punished for that. But
20 that was the reason for the sort of multi-month delay in terms
21 of Swiss imprisonment.

22 So having made those points, the government other than
23 that would rest on its submission, unless the Court has any
24 additional questions for us at this time.

25 THE COURT: No questions at this point.

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1 Mr. Schachter, is there anything else you would wish
2 to say to the Court with respect to sentencing before we
3 proceed?

4 MR. SCHACHTER: Yes. Thank you, your Honor, for the
5 opportunity to speak on behalf of Dov.

6 Your Honor, I want to impart something that
7 Mr. Jackson and I experienced from our very first meeting with
8 him that I think we both found to be something that was a bit
9 unusual. At even our very first conversation, as we spoke to
10 him about the events and also to get to know him, the one thing
11 that we found striking was that any mention that even
12 approached a discussion of his children, it would result in him
13 actually needing to pause the discussion. He couldn't go on.
14 He would stop, he would well up, he would start to cry at their
15 mere mention. And I think we came to see that that was as a
16 result of two things.

17 The first was, what we learned was the very unique
18 bond that Dov has in particular with his son Natan, who we came
19 to learn of after he was born prematurely. He suffered from
20 some developmental and emotional issues. And Dov, being the
21 kind of person -- as we hope your Honor has seen in the letters
22 that were submitted -- who rushes to help, he did that with his
23 son, and he rushed to his side and he stayed at his side from
24 his birth on. And as I think the letters make clear, he
25 developed a very close attachment, an unusually close

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1 attachment. I mean, every parent obviously loves their
2 children, but the attachment that I think comes through in the
3 letters that were submitted to your Honor, I think, show a
4 relationship that is unique, and I think driven from the
5 difficulties that Natan has faced.

6 And we also saw, of course, the relationship that Dov
7 has with his really then brand new daughter Noah. And I said I
8 think we're seeing two things. Because it wasn't just the
9 relationship that was causing him to become emotional in such a
10 way that we had to pause our discussion, but I think we were
11 also seeing in those very early discussions, Dov recognized the
12 harm that he had caused -- potential harm at that point -- to
13 these things that he loved more than anything the world. That
14 potential became, of course, a reality, when Dov was arrested
15 and then incarcerated in Champ-Dollan prison.

16 And to be clear, Mr. Malnik -- and of course we agree
17 with Mr. Tracer that this is a serious crime, and nobody would
18 suggest otherwise, least of all Mr. Malnik -- I don't know that
19 we agree that in an insider trading fact pattern that someone
20 who was in Mr. Malnik's role is more culpable than someone like
21 Mr. Cohen who is the insider. Of course, legally, the
22 liability of any person who trades on information is only
23 derivative of that of the insider who steals the information.

24 And in the circumstance, Mr. Cohen, did not serve any
25 term of imprisonment. We say this, again, not to suggest in

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1 any way, shape or form that this is not a very serious crime
2 that causes harm to the system at large. And we in no way
3 disagree with what Mr. Tracer has to say, and nor does
4 Mr. Malnik.

5 We note, rather, that the punishment that Mr. Malnik
6 has suffered for his actions has been very severe. The papers
7 laid out the conditions that Mr. Malnik found himself in at
8 Champ-Dollan, being incarcerated for eight months during the
9 heart of the pandemic, being confined to a cell for 23 hours a
10 day with an accused murderer, the weeks of quarantine that he
11 faced upon his arrival, the seven weeks that he was of course
12 confined without notice. And so his children had him taken
13 from them and then separated without any contact whatsoever,
14 not a single call for seven weeks. He went four months without
15 seeing his four-year-old son. And then when he was able to, it
16 was through a Plexiglas screen. He had to miss Noah's first
17 steps, her first words, and saw her only once during the eight
18 months that he was confined there.

19 And I think what is probably hardest is he's had to
20 live with the fact, with the knowledge that he is the one that
21 caused this harm to them, that there's nobody else to blame.
22 And he has never blamed anyone else, never sought to shift
23 blame to anyone else. He has lived with the knowledge living
24 under those conditions for eight months, he had to live with
25 the knowledge that he is the sole cause of the harm that his

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1 children have had to suffer having their father taken from them
2 with no notice and no explanation that they can understand. He
3 certainly believes that, while he will try to remedy that, try
4 to address that, at age four, this is a trauma that Natan will
5 carry with him perhaps his entire life. And Dov has to live
6 with the fact that he caused that pain, and that is a
7 punishment that is severe beyond the period of his
8 incarceration, that he has caused harm to those he loves most.

9 And your Honor, I should note that there were many,
10 many beeps on the phone. And that is by the people that love
11 Dov. His wife is on, his parents, his brothers, friends. And
12 he thinks of them not only as being grateful for their love and
13 the support through this, but also as the people that he has
14 harmed through his actions. And that is a very severe
15 punishment indeed.

16 It is also worth noting that this punishment has
17 continued beyond just the eight months that he was incarcerated
18 at Champ-Dollan. But he has also been under home confinement
19 here, separated from his family for the past five months in a
20 foreign land, which of course is different than being confined
21 to one's home where they have their loved ones near them, able
22 to visit. And so that is a separation beyond the eight months
23 that continues to be a severe punishment. A warranted one --
24 and Dov would not quarrel with that -- but a punishment that is
25 lengthy, harsh and that he has already served.

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1 And of course, Mr. Tracer is right about the effects
2 of the pandemic easing, but I think what Judge Cote considered
3 when she was providing sentence to Mr. Lavidas and what Judge
4 Pauley recognized was that the issue with respect to the
5 pandemic has been the very, very difficult conditions that one
6 faces when they're incarcerated under the conditions that
7 prisons had to impose by virtue of the pandemic. And so it is
8 that period of time, it is because of that condition that Dov's
9 incarceration was -- Champ-Dollan has terrible conditions, it
10 would have been terrible under any circumstances -- but it was
11 that much worse because he was serving this time during the
12 pandemic. It's for that reason that Judge Oetken in addressing
13 it thinks about the time served during the course of the
14 pandemic as being one and a half or two times the length of
15 time that was actually served because the conditions are so
16 harsh.

17 We should also note, in terms of punishment or really
18 a signal, not just of punishment, but also of his desire to
19 accept responsibility beyond his guilty plea, but Mr. Malnik
20 has also reached an agreement to pay a financial penalty, the
21 financial penalty that was demanded by the Securities and
22 Exchange Commission. Those papers were submitted to Judge
23 Preska yesterday. And so he's paying a penalty of \$2.8 million
24 in addition to that, which bears noting.

25 So your Honor, it's for those reasons that we pray

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1 that the Court agrees with probation that the punishment that
2 Mr. Malnik has already suffered is sufficient to meet the
3 requirements of 3553(a), particularly in light not just of the
4 punishment he has sustained already, but in light of the
5 sentences that were meted out to the other participants in the
6 scheme.

7 And also, we pray that your Honor reaches that
8 conclusion because of the harm that will be caused by further
9 separation to Dov's children in particular. They had to live
10 with having their father separated from them for that period,
11 and now they are back in touch. They are able to have regular
12 FaceTime communications. And to be placed in a circumstance
13 where he is to be separated again from his children, it is
14 obviously a significant worry about the additional harm that
15 his children will suffer as a result of that. And to be clear,
16 your Honor, Mr. Malnik knows that if that happens, that is his
17 fault. But we hope that the Court will conclude that further
18 incarceration is not necessary to meet the purposes of
19 sentencing.

20 And we also note, your Honor, that any sentence, any
21 additional sentence to be imposed here creates a level of
22 uncertainty and difficulty beyond those that other similarly
23 situated people before the Court would suffer. And that is
24 because he is not a citizen, he is not eligible for the
25 conditions of confinement at a minimum security facility that

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1 anybody else standing before the Court for this offense would
2 face. He's not eligible for that. The Bureau of Prisons will
3 not allow a noncitizen to be placed in a minimum security
4 prison. That was a significant factor that Judge Pauley
5 considered in choosing not to impose any period of confinement
6 for Mr. Cohen. And also, he would be placed in a private
7 prison. And as we outlined in our papers, the conditions at
8 the private prisons is just significantly worse than those that
9 are under the auspices of the Bureau of Prisons.

10 And lastly, whatever sentence, whatever incremental
11 sentence would be imposed is indeterminate because it is
12 outside of anybody's control -- including even the Court's --
13 to know how long he ultimately will be incarcerated because
14 when Mr. Malnik completes whatever term of imprisonment would
15 be imposed, he is then turned over to the Immigration and
16 Customs Enforcement folks. And those conditions are famously
17 terrible. And while there are steps that can be taken to try
18 to ease their process prior to deportation, it is impossible to
19 know with any degree of certainty how long he will be
20 incarcerated beyond whatever term the Court would impose.

21 And so, your Honor, it is for all of these reasons
22 that it is our hope and our prayer that the Court feels that
23 the punishment that Mr. Malnik has already sustained is
24 sufficient. Thank you, your Honor.

25 THE COURT: Thank you.

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1 Mr. Malnik, is there anything you would like to say on
2 your own behalf before the Court imposes sentence?

3 THE DEFENDANT: Yes, your Honor. And thank you, your
4 Honor, for giving me the opportunity to say a few words.

5 I'm terribly sorry and ashamed to be here before you
6 today. It has been a very difficult moment for me, it is now
7 and has been for a long time now. Your Honor, I broke the law,
8 and I regret it deeply. My conduct was in stark contrast to
9 everything I previously achieved in my life; the hard work I've
10 always put into everything. It goes against how I was raised
11 and most importantly for how I wish to raise my children. I'm
12 so sorry for my conduct. It was wrong.

13 This past year and a half has been hard, the worst and
14 most devastating -- especially for my family, my wife and my
15 young children -- but I have only myself to blame, which I do.
16 I will forever carry with me the burden of knowing that they
17 have been so affected by my own doing.

18 A year ago, last December, I was in prison, while my
19 son, Natan, celebrated his fourth birthday. Back then, it's
20 been three months that I practically had no contact with him.
21 My wife sent me a photo standing in front of his birthday cake.
22 She was standing next to him, holding my baby daughter. And it
23 was difficult to see the empty space on Natan's other side,
24 where I should be. I've always been inseparable from him. And
25 I helped him in his challenging condition throughout his life.

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1 Not being there to help him was so painful. And hearing now
2 today from his schoolteachers the effect that my absence has
3 had on him, on Natan, and knowing that my actions have
4 ultimately caused this is devastating.

5 Your Honor, the many months alone in my prison cell
6 gave me a lot of time to reflect about my life, about my role
7 in the lives of people around me and to think again and again
8 about my actions. I know that my conduct was wrong. And I've
9 learned the meaning of consequences and accountability. I will
10 never do anything to jeopardize my integrity or do anything
11 that goes against my values and the law.

12 I would like to apologize to my family for the
13 hardship they had to endure, to my friends -- some of whom are
14 on this call today -- and thank them all for their support.
15 One day, I will have to apologize to my kids, and I will
16 explain them what I did and how it was wrong. I will need to
17 answer the many questions that I'm sure my son and daughter
18 will have about this difficult period in our family's past. I
19 will do it, and I will work to be the best father, husband and
20 community member that I can. I will help people around me in
21 any way I can. And I will try to regain my place in the
22 community.

23 I want to finish by apologizing to your Honor, to the
24 communities that my actions have impacted and anyone affected
25 by this case. I humbly and respectfully ask for your leniency.

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1 Thank you, your Honor.

2 THE COURT: Thank you.

3 In accordance with the decision by the United States
4 Supreme Court in *United States v. Booker*, the United States
5 sentencing guidelines are not mandatory. This court
6 nonetheless must consult those guidelines and take them into
7 account at sentencing. Therefore, the Court has considered the
8 findings of fact cited in the presentence investigation report,
9 as well as the guidelines analysis and the recommendations
10 contained therein. The Court has weighed this information
11 along with the factors listed in 18 U.S.C. §3553(a) in coming
12 to its final sentencing decision in this case. The Court
13 adopts the factual recitation in the revised presentence
14 investigation report regarding the criminal history, offense
15 level and sentencing range. Therefore, the Court finds that,
16 under the guidelines, Mr. Malnik's offense level amounts to 21
17 and his criminal history category falls into category I. The
18 statutory maximum sentence of imprisonment is 20 years. The
19 guidelines range of imprisonment for the offense level and
20 criminal history category is 37 to 46 months' imprisonment.

21 Mr. Malnik pled guilty to Count Nine of the
22 indictment, which charged him with making timely and profitable
23 securities trades based on material nonpublic information in
24 violation of 15 U.S.C. Sections 78J.B and 78F.F and also 17 CFR
25 section 240.1B-5 and 18 U.S.C. Section 2. The probation office

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1 has recommended that the Court impose a sentence of time
2 served.

3 Subsection (a)(1) of 18 U.S.C. §3553 requires that
4 courts take into consideration the nature and circumstances of
5 the offense and the history and characteristics of the
6 defendant. Subsection (a)(2) of 18 U.S.C. §3553 requires that
7 the court consider the need for the sentence to promote certain
8 objectives of the criminal justice system, namely, punishments,
9 specific and general deterrence and rehabilitation. Pursuant
10 to §3553(a)(6), the Court is also directed to consider the need
11 to avoid unwarranted sentencing disparities among defendants
12 with similar records and similar offenses in other cases as
13 well as in connection with the case at hand.

14 Mr. Malnik, I've taken into account the nature and
15 circumstances of the offense and the history and
16 characteristics of the defendant. In considering all of the
17 factors listed in 18 U.S.C. §3553(a), the Court finds that a
18 sentence of 30 months' imprisonment is reasonable and
19 appropriate and that such a term is sufficient, but not greater
20 than necessary, to promote the proper objectives of sentencing.
21 The Court intends and understands that the 30-month sentence
22 that I have imposed will not or does not include the eight
23 months imprisonment that Mr. Malnik experienced while awaiting
24 extradition. Therefore, the Court will credit those eight
25 months to the 30-month sentence, meaning that Mr. Malnik's

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1 total custody in the Bureau of Prisons will not exceed 22
2 months.

3 I will not impose a sentence of supervised release in
4 light of the Court's understanding that Mr. Malnik, not being a
5 citizen, will be subject to immigration custody after
6 completing his sentence for the purposes of deportation.

7 I will also impose a fine in the amount of \$50,000, as
8 well as a mandatory special assessment of \$100, which shall be
9 due immediately.

10 The Court has received and has so ordered a consent of
11 preliminary order of forfeiture and money judgment that has
12 been signed by both parties. The amount of the judgment of
13 forfeiture is \$1,594,779, which represents the amount of
14 proceeds traceable to the defendant's commission of insider
15 trading in Count Nine as he has admitted.

16 In imposing this sentence, I have taken into account a
17 number of considerations. The defendant has asked for a
18 sentence of time served, which essentially represents the eight
19 months that he has already served in this proceeding by virtue
20 of his custody in Switzerland. I am not persuaded that time
21 served, as recommended by the probation department, is
22 appropriate here or warranted. I believe that time served
23 under the circumstances of this case effectively minimizes the
24 seriousness of the offense and would create, in my view, an
25 unwarranted sentencing disparity with other defendants who have

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1 committed comparable insider trading conduct.

2 Mr. Malnik was a manager of -- effectively a manager
3 of a criminal enterprise that he originated, that he
4 maintained. It has international dimension. It used
5 sophisticated means of various institutions around the world.
6 It went on for a long period of time; several years. It was
7 very sophisticated. Mr. Malnik is not an amateur in this
8 business. He orchestrated the entire scheme. Again, this is
9 not just occasional insider trading for small profits, in
10 particular, stock. This went on with multiple securities over
11 the course of many years. Accordingly, the scope of the breach
12 of trust and confidence that was involved in Mr. Malnik's
13 conduct is much, much greater than it is in the cases of
14 smaller players that -- I consider the circumstances of
15 Mr. Lavidas and Mr. Cohen as falling into the category of being
16 smaller players in a much more modest criminal conduct.
17 Mr. Malnik, in effect, was guilty of cheating and stealing
18 confidential information, dealing in stolen goods to the tune
19 of millions of dollars. And that is the context in which a
20 determination of what is an appropriate sentence should be
21 regarded.

22 I have taken into account the fact that Mr. Malnik is
23 subject to deportation after he finishes his sentence and that
24 that deportation could conceivably entail another substantial
25 period of time in the custody of the immigration authorities.

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1 And in comparable circumstances, this Court has recognized that
2 as a factor that could be considered in determining appropriate
3 sentencing that's outside of the guidelines.

4 I've taken into account Mr. Malnik's expression of
5 remorse and his family support and the impacts of the sentence
6 and his incarceration further on his family. That, of course,
7 is a circumstance that is not necessarily unique to Mr. Malnik.
8 Every defendant who is convicted of a crime, if asked about the
9 impact of the conviction and separation from family and friends
10 would give you many, many details that would parallel the kind
11 of difficulties that Mr. Schachter described that Mr. Malnik
12 will suffer. So while that is a situation the Court can
13 consider, it is not the reason for a sentence of time served
14 that would be unwarranted.

15 And in that regard, finally, I have taken into account
16 the potential disparities that would be caused by a sentence of
17 time served here. When Mr. Lavidas was sentenced to a year and
18 a day by Judge Cote -- who indicated that she was not convinced
19 that that sentence was the appropriate length under the unique
20 circumstances that appeared before her regarding the impact of
21 the pandemic. Similarly, Mr. Cohen's sentence of time served
22 should not be a measure that Mr. Malnik should also be
23 sentenced to time served in light of the Court's finding that,
24 overall, the scope of Mr. Malnik's role in the underlying
25 conspiracy -- violation, I should say, not conspiracy -- the

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1 violation of insider trading was multiple degrees much more
2 serious than the role of Mr. Cohen.

3 The sentence as stated is imposed.

4 Mr. Malnik, to the extent you have a right to appeal
5 your sentence and you are unable to pay the costs of an appeal,
6 you have the right to appeal *in forma pauperis*, meaning as a
7 poor person. If you make such a request, the clerk of court
8 must immediately prepare and file an order for appeal on your
9 behalf.

10 Do you understand your right to appeal to the extent
11 that it may exist?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Mr. Tracer, are there any remaining counts
14 or underlying dockets that need to be dismissed at this time?

15 MR. TRACER: Yes, there are both, your Honor. And the
16 government moves to dismiss any remaining open counts against
17 the defendant.

18 THE COURT: It will be so ordered.

19 Anything else from the government, Mr. Tracer?

20 MR. TRACER: No, your Honor.

21 THE COURT: Mr. Schachter, anything else on behalf of
22 Mr. Malnik?

23 MR. SCHACHTER: Yes, your Honor.

24 I am very concerned that we did not do a good enough
25 job in our sentencing submission of addressing Mr. Malnik's

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1 role in the offense, your Honor. We are very concerned that
2 the sentence that the Court has imposed is based on a very
3 significant mistaken fact that is not reflected in the
4 presentence report. The facts -- and I believe that Mr. Tracer
5 will agree with me -- the facts do not support a conclusion
6 that Mr. Malnik originated or led this scheme. His role,
7 while -- and we do not dispute in any way its seriousness. He
8 is a downstream tippee. He did not originate, lead. It was
9 not his idea. And he did not drive the process by which
10 information was misappropriated. He was someone who -- he had
11 no part in that process. And he received the information that
12 was handed from person to person. And that is serious, your
13 Honor, but the facts do not support the idea that he originated
14 or led. And I am terrified and sick to my stomach that we may
15 have allowed the Court to misapprehend what the nature of his
16 conduct were, your Honor.

17 And while I understand that it is unusual, it is our
18 request, your Honor, to allow us to make a supplemental
19 submission. Because I know that Mr. Tracer will agree, the
20 government has characterized Mr. Demane, from whom -- who
21 passed this information on to Mr. Malnik -- themselves, they
22 refer to him as a tertiary player in this offense. And that
23 means that the government, I believe, would view Mr. Malnik as
24 a similar -- actually, as a lesser figure in the offense than
25 Mr. Demane. And that is not to suggest that his role was not

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1 serious.

2 But we are very concerned, your Honor, that -- and we
3 beg the Court for the opportunity to delay imposition to give
4 us the opportunity to put in a submission which addresses how
5 the information was misappropriated, how it was passed along,
6 and that addresses Mr. Malnik's role so that the Court can see
7 it. And it may be that the Court will reach the same decision,
8 we understand that. But we beg the Court for the opportunity
9 to delay imposition of sentence so that we have the opportunity
10 to make one last submission for the Court and then reconvene
11 this hearing after hearing from both us and from the government
12 as to Mr. Malnik's role. That is what we are begging the Court
13 for.

14 THE COURT: I thank you, Mr. Schachter.
15 Mr. Schachter, what you are in a sense saying to the Court at
16 this time is what you would say to the Court of Appeals. So I
17 think that it would be more appropriate for you to save those
18 arguments for any appeal. I have examined this record very,
19 very closely.

20 Just one observation that I think is sufficient to
21 indicate why the Court is not persuaded that anything further,
22 any further briefing here is warranted or that the Court should
23 somehow re-examine its sentencing. Mr. Malnik was not involved
24 in an insider trade transaction involving one stock one time.
25 I indicated -- and I will repeat -- his involvement in this

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1 crime occurred over an extensive period of time. It was a very
2 sophisticated scheme involving many, many players. Mr. Malnik
3 was a key player to the extent that he was the one at the end
4 of the chain receiving the information and trading upon it.
5 Again, this is not a one-off, one-time situation. He, in
6 effect, was part of an enterprise in which he played a very
7 significant role that netted him millions of dollars. That is
8 not something -- what you have indicated is not something that
9 I have omitted to consider, and it is part and parcel of my
10 characterizing the offense here as one that Mr. Malnik managed.
11 To the extent he received information and he was part of a
12 chain over many years of receiving stolen, confidential
13 information and trading upon it, he was the one who originated
14 that particular transaction based on the information that he
15 knew was confidential information and not to be used for
16 insider trading.

17 So the sentence as stated is imposed. I don't see
18 that there is anything further that the Court needs to sustain
19 its sentence.

20 Is there anything else, Mr. Schachter?

21 MR. SCHACHTER: We understand the Court's decision, of
22 course.

23 Your Honor, we would ask that in addition to credit
24 for the time that Mr. Malnik served at Champ-Dollan that the
25 Court also provide him credit for the five months that he has

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1 served here in home confinement separated from his family. We
2 would ask that the Court please consider crediting him for that
3 time as well.

4 THE COURT: Mr. Schachter, I'm not aware of any
5 precedent where courts have credited home confinement as a part
6 of reducing the sentence or going beyond a below the guidelines
7 range on that score. I have taken -- I have indicated that I
8 have taken into account all of the circumstances relating to
9 the difficulties that Mr. Malnik has encountered concerning his
10 family, separation from them. That's all part of what I
11 indicated were the Court's considerations.

12 Is there anything else?

13 MR. SCHACHTER: Yes, your Honor. Two things.

14 First, with respect to forfeiture, as the Court is
15 undoubtedly aware, the plea agreement provides that Mr. Malnik
16 should be credited for the amounts that he has paid the SEC,
17 which will exceed the amount of forfeiture. We have discussed
18 with the government and we understand that the government will
19 seek dismissal of the forfeiture order or satisfaction of the
20 forfeiture order upon payment of the amounts which have now
21 agreed to be paid to the Securities and Exchange Commission.
22 So we want to address that.

23 THE COURT: When that happens, the government will
24 submit a revised forfeiture order, and the Court will consider
25 it at that point.

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1 MR. SCHACHTER: And then, your Honor, with respect to
2 designation, we ask that the Court -- we do not believe that
3 the Bureau of Prisons will place Mr. Malnik in a minimum
4 security facility -- we would ask nonetheless that the Court
5 recommend that the Bureau of Prisons place him in a minimum
6 security facility. Or if they cannot do that, that they
7 designate Mr. Malnik to Allenwood low security, which we
8 understand to be the lowest security designation that they are
9 able to place him in. But we would ask the Court for the
10 recommendation for either a minimum security facility or to
11 Allenwood in their low security facility.

12 THE COURT: Thank you.

13 The Court will recommend to the Bureau of Prisons that
14 Mr. Malnik be held in custody at the Allenwood facility. The
15 Court does not have any authority to, in my view, go beyond and
16 express an opinion about whether Mr. Malnik deserves to be in
17 minimum or maximum security. That really is a matter within
18 the prerogative of the Bureau of Prisons, but the Court will
19 recommend Allenwood.

20 MR. SCHACHTER: Your Honor, I understand. We
21 understand the Court's view on that. Would the Court be able
22 to recommend Otisville if minimum and Allenwood if low, if that
23 would be possible for the Court to word its recommendation in
24 that fashion.

25 THE COURT: We are getting, again, into details that

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1 the Court does not view as appropriate here. The Court will
2 recommend Allenwood and/or Otisville, but I'm not going to go
3 beyond that and try to spell out for the Bureau of Prisons
4 which inmate deserves to be in one grade rather than another.
5 That really, in my view, would be intruding upon the
6 jurisdiction and the prerogative of the Bureau of Prisons.

7 MR. SCHACHTER: We understand, your Honor. Thank you.

8 THE COURT: If there's nothing else, I thank you.
9 Have a good day and a good weekend.

10 (Adjourned)